

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| Kansas Corporation Commission's |) | |
| Petition for Declaratory Ruling Affirming the |) | WC Docket No. 08-55 |
| Lawfulness of Its USF Certification Procedure |) | |
| |) | |

**REPLY COMMENTS OF THE
KANSAS CORPORATION COMMISSION**

Martha Coffman
Chief Advisory Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Tel: (785) 271-3105

Elisabeth H. Ross
Charles R. Eberle
Birch, Horton, Bittner & Cherot, P.C.
1155 Connecticut Avenue NW
Suite 1200
Washington, D.C. 20036
Tel: (202) 659-5800

Colleen Harrell
Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Tel: (785) 271-3105

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EXECUTIVE SUMMARY

The issue before the FCC is whether a state commission has discretion to certify only those Competitive Eligible Telecommunications Carrier (“CETC”) costs and expenses incurred within “supported” study areas,¹ or study areas that the FCC has determined need “high-cost” support, to promote universal service. The FCC requires states to certify that support provided to ETCs will be used only for the provision, maintenance and upgrading of facilities and services for which support is intended. Since the rules require certification of expenses related to facilities and services that universal service funds are intended to support, it is reasonable for a state to focus certification on cost and investments in “supported” areas.

Several wireless carriers designated as CETCs in the study areas of rural telephone companies in Kansas, and in certain Southwestern Bell (“SWB”) high-cost study areas, make incorrect arguments alleging that the procedure violates federal law. They claim that the KCC categorically prohibits them from investing in SWB areas and unfairly denies them USF support. Plainly, the KCC procedure does no such things. Their technical arguments misinterpret federal law and the KCC’s CETC designation orders. The KCC designated the carriers as CETCs in different study areas, and did not consolidate their SWB and rural telephone company study areas into one undifferentiated whole. Clearly, the KCC can limit a CETC’s expenses it will certify for universal service purposes to “supported” areas for which it is designated.

These carriers have elected to be designated as CETCs in certain SWB wire centers, and, consequently, must serve throughout those areas, despite only receiving IAS to offset high costs.

¹ The KCC effectively defined “supported” areas to exclude Interstate Access Support (“IAS”) because it is not required to certify IAS under the FCC’s certification rules, and consequently, it does not have oversight over this support. “Supported” in these comments reflects that meaning.

The FCC has found that SWB's study area is not "high-cost" under its non rural support mechanism, and therefore does not provide SWB any model-based high-cost support. The CETCs' challenges are impacted by the FCC's universal service rules. The KCC procedure is not to blame for their financial issues. The procedure carries through the FCC's policies. As such, the procedure reflects a reasonable interpretation of Section 254(e).

The KCC adopted its procedure to encourage CETCs to make investments and service improvements in rural telephone company service areas that the FCC determined needed "high-cost" support to achieve reasonably comparable and affordable rates. The KCC procedure balances CETCs' interest in economical and efficient operations with this policy. It allows CETCs to "count" costs expended in SWB study areas that benefit "supported" rural telephone company study areas for certification purposes. Moreover, it allows CETCs to "count" expenses anywhere in their "supported" rural telephone company study areas to justify USF payments. The KCC can also make Kansas Universal Service Fund ("KUSF") support available to CETCs for high-cost service in SWB study areas, just as it has for SWB, but none of the CETCs commenting here has actually applied for state support.

The FCC intended states to have broad discretion in adopting certification procedures. It said it was most appropriate for states to determine how support should be used to further Section 254(e)'s purposes. Different states may adopt different procedures to carry out this intent. The FCC should affirm states' flexibility to set their own procedures consistent with federal law, and find that the KCC certification procedure is based on a reasonable interpretation of Section 254(e).

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WC Docket No. 08-55

**REPLY COMMENTS OF THE
KANSAS CORPORATION COMMISSION**

I. INTRODUCTION

The Kansas Corporation Commission ("KCC") hereby replies to the comments filed regarding its Petition for Declaratory Ruling in this case.² Supporting parties, the National Association of State Utility Consumer Advocates ("NASUCA"), TCA, Embarq and AT&T, Inc. ("AT&T"),³ present further factual information, case authority, and policy justifications demonstrating that the KCC certification procedure is reasonable, lawful, and consistent with Section 254(e). Opposing parties Sprint Nextel Corporation ("Sprint"), Alltel Communications, LLC ("Alltel"), and U.S. Cellular and Rural Cellular Corporation ("U.S. Cellular/RCC") (collectively, "the Kansas CETCs"), challenge the procedure based on incorrect facts and misinterpretations of law, and they fail to recognize important state policies underlying the KCC certification process.

The KCC makes the following points on reply:

² *In the Matter of Kansas Corporation Commission's Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure*, WC Docket No. 08-55, Petition for Declaratory Ruling (filed April 16, 2008) ("*KCC Petition*").

³ AT&T has acquired SWB.

- The KCC certification procedure is consistent with Section 254(e)'s requirement that support be used for the purposes intended by the Act. It encourages CETCs to use support for the rural telephone company study areas that the FCC determined need high-cost support. It does not prohibit CETC entry in SWB's area.
- The KCC certification procedure is designed to give CETCs flexibility – they can count joint costs in SWB's area to justify USF receipts and can count costs anywhere in the “supported” rural ILEC study areas to justify USF receipts. CETCs can also seek state universal service support to aid service to high-cost SWB areas.
- The procedure is consistent with Section 214(e). The CETCs confuse their statewide service areas with their ETC study areas governing USF. The KCC properly defined study areas for USF purposes and did not consolidate the CETCs' rural telephone company and SWB study areas.
- The FCC gave states discretion to develop certification procedures that addressed their own local policies and demographics. Different states may apply different procedures. Since the KCC procedure is consistent with federal law, it should be affirmed.
- The KCC procedure is competitively neutral in all respects. The CETCs omit that they also receive IAS in SWB's area. The KCC treats all ETCs in the same manner.
- The KCC procedure benefits consumers. It encourages CETCs to invest USF support in rural areas designated as high-cost by the FCC to benefit rural consumers in those locations.
- The KCC Petition is timely. The Petition reflects a live controversy referred to the FCC by a federal court. The FCC should not wait to address the Petition until after it completes long term universal service reform. The Petition addresses how states certify USF costs, not issues such as how CETC costs should be measured.

The FCC should declare that states are not preempted from adopting reasonable procedures for certifying CETCs' receipt of funds from the federal Universal Service Fund (“USF”) and that the KCC's procedure is lawful because it reflects a permissible interpretation of Section 254(e) of the Act.⁴

⁴ See 47 U.S.C. § 254(e) (2006).

II. THE KCC CERTIFICATION PROCEDURE REASONABLY IMPOSES ACCOUNTABILITY; IT DOES NOT IMPOSE A BARRIER TO ENTRY IN VIOLATION OF SECTION 253(A)

This case is about whether a state commission has discretion to limit CETC costs and expenses it will certify for USF purposes to those incurred within “supported” study areas, the study areas which the FCC has determined require “high-cost” support (that is subject to state certification). The FCC requires states to certify that support provided to ETCs in the state will be used only for “the provision, maintenance, and upgrading of facilities and services for which support is intended.”⁵ Since the rule requires certification of expenses related to facilities and services that universal service funds are intended to support, it is reasonable for a state to focus certification on costs and investments in “supported” areas.⁶

The Kansas CETCs mischaracterize the KCC procedure and its accountability purpose. U.S. Cellular/RCC says the KCC’s procedure “categorically prohibit[s]” CETCs from investing support in SWB’s service area and erects an unlawful barrier to entry.⁷ Similarly, Alltel complains that the KCC certification procedure “actually prohibit[s] CETCs from using federal universal service funds to provide, maintain and upgrade their facilities and services throughout the service areas for which they have been designated ETCs...”⁸ Plainly, the KCC does not

⁵ 47 C.F.R. § 54.313 and §54.314 (2006).

⁶ SWB’s study area is “unsupported” from the KCC’s perspective, because CETCs only receive IAS there, and the KCC does not certify IAS. Effectively, in determining how to meet its obligations to certify USF use to the FCC, the KCC defined high-cost support to exclude IAS, which was beyond its jurisdiction. Therefore, the CETCs generally cannot “count” costs and investments in SWB’s “unsupported” study area to justify support received for the rural carriers’ “supported” study areas.

⁷ *In the Matter of Kansas Corporation Commission’s Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure*, WC Docket No. 08-55, Comments of U.S. Cellular and Rural Cellular Corporation (filed June 2, 2008) (“*U.S. Cellular/RCC Comments*”) at ii and 9.

⁸ *In the Matter of Kansas Corporation Commission’s Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure*, WC Docket No. 08-55, Comments of Alltel (filed June 2, 2008) (“*Alltel Comments*”) at 2.

restrict CETCs from investing in rural areas served by SWB, direct the CETCs where to spend money, or deny them any federal universal service support. CETCs are free to invest anywhere they please. The KCC simply certifies CETC expenditures for high-cost support based on (1) FCC rules identifying types of support it must certify, and (2) FCC rules determining support levels for rural and non rural carrier study areas.

Certainly, the Kansas CETCs face challenges. They have chosen to obtain ETC status in SWB study areas, and are obligated to serve throughout each wire center study area. They only receive IAS to offset high costs, however. These challenges, while significant, are impacted by the operation of the FCC's non rural carrier mechanism that does not provide model-based support for SWB rural areas. Such financial concerns should not be blamed on the KCC's reasonable certification procedure.

In fact, the KCC's certification procedure is designed to give the Kansas CETCs flexibility, while still encouraging high-cost support to be invested in "supported" areas. The KCC allows CETCs to allocate a portion of costs in SWB's study area to rural ILEC "supported" areas, as long as the facilities or services provided also benefit consumers in those areas. The KCC also has allowed CETCs to count costs and expenses incurred anywhere in "supported" areas in Kansas for certification purposes to give wireless carriers flexibility to build out their networks in an efficient and economical manner. CETCs are not required to target funds to the specific rural ILEC study area from which they were generated. To date, no CETC's costs have been found insufficient for certification.

Moreover, the KCC has made support from the KUSF available to SWB to aid in serving its high-cost areas. It has also made KUSF support available to several CETCs, but none of the

wireless carriers who questioned the certification procedure has applied.⁹ The KCC is making many efforts to address the high-cost of service throughout Kansas. In this context, however, it wants to ensure that the CETCs make service improvements, build cell towers and upgrade plans in the smaller rural ILEC study areas intended to receive federal high-cost support, not just in SWB areas.

Under the Kansas CETCs' interpretation of the statutes, CETCs would have no accountability for directing service improvements and investments to study areas for which that support was intended. For example, a CETC could invest \$18 million in cell towers to serve the relatively large SWB town of Salina, and then use those costs to justify \$18 million in USF money that was granted for use in the study area of Rural Telephone Service Company, including customers located in the very small communities of Olmitz, Lenora or Zurich. The KCC's certification procedure is a reasonable means of encouraging CETCs to use support granted to aid consumers in rural telephone company study areas, for services and facilities located in those areas as a whole. As such, it is a reasonable procedure, imposed on a competitively neutral basis, that preserves and advances universal service, and promotes the continued quality of telecommunications services under 47 U.S.C. § 253(b).

III. THE KCC PROCEDURE IS CONSISTENT WITH THE ACT'S REQUIREMENT THAT SUPPORT BE USED FOR THE PURPOSES INTENDED

The Kansas CETCs suggest that the KCC procedure is not consistent with Section 254(e), Section 214(e), and the FCC's orders establishing certification procedures in CC 96-45. These arguments are all clearly wrong. The KCC specifically designed its procedure to ensure that

⁹ Alltel did receive some KUSF support from the Western Wireless properties it obtained, but chose not to receive ongoing support, and has not actually applied for support on a going forward basis.

CETCs use high-cost support as the FCC and the Act intended, to provide service within the rural ILEC study areas for which the CETCs were designated as eligible to receive that support. In fact, the FCC's CC 96-45 orders grant states broad discretion to develop procedures to direct support consistent with these requirements.

A. The KCC Procedure Reflects a Reasonable Interpretation of Section 254(e)

The KCC procedure reasonably carries out Section 254(e)'s requirement that ETCs use support only for the "facilities and services for which the support is intended." The KCC ensures that support is being used as intended by certifying CETC costs and expenses in areas that the FCC has found are "high-cost" under its rules.¹⁰

As Embarq noted, the KCC's procedure clarifies the Act's requirements. Embarq says that support that is made available for serving customers in rural, high-cost areas clearly cannot be intended for use in a different, "unsupported," non rural high-cost area:

Inherently, there is (and must be) a direct connection between the facilities and services that generate support and the facilities and services that are intended to be supported. To suggest otherwise simply defies logic, because it suggests that support could be *intended* for an area even if that area currently receives no support. The KCC's certification requirements, therefore, only add specificity and clarity to the federal requirements and are in no way inconsistent with 47 C.F.R. § 54.7.¹¹

The FCC has determined which non rural carrier study areas require model-based high-cost support based on its own policy reasons. To control the size of the USF, the FCC requires non rural carriers to offset their costs in high-cost areas with revenues from lower cost areas. The USF provides support where a non rural carrier's internal resources (i.e. low cost areas) are

¹⁰ The KCC effectively defined "high-cost" to exclude IAS because it does not certify IAS under the FCC's rules.

¹¹ *In the Matter of Kansas Corporation Commission's Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure*, WC Docket No. 08-55, Comments of Embarq (filed June 2, 2008) ("*Embarq Comments*") at 2.

not sufficient to bear this burden, and only requires other states to cross-subsidize a high-cost state where statewide averaged costs exceed specific levels. If the Kansas CETCs disagree with the FCC's universal service rules for non rural carriers, they should direct these concerns to the FCC. The KCC is carrying forward the FCC's policy in its certification procedure.

The KCC procedure ensures that when ILEC support is ported to Kansas CETCs, the FCC's intended use of the support is upheld. The FCC implemented competitively-neutral porting so that CETCs serving customers in "supported" areas would have access to the same per-line support. The policy ensured that federal funds, even when ported to a CETC, would remain directed to high-cost study areas. As the FCC said in its *Seventh Report and Order*:

[W]e agree with the Joint Board that competitive neutrality is a fundamental principle of universal service reform and that portability of support is necessary to ensure that universal service support is distributed in a competitively neutral manner. We also agree with US West that '*portability*' of support should not be used to divert federal funds from high-cost areas to other areas.¹²

B. The KCC Procedure Properly Targets Support to the Study Areas for Which Support Was Intended

The KCC has designated U.S. Cellular, RCC, Sprint and Alltel as CETCs in the study areas of rural telephone companies and also in specially-created high-cost wire center study areas of SWB. Sprint complains that the KCC procedure improperly splits a CETC's service area between study areas for which an ILEC receives support, and study areas for which the ILEC does not receive support.¹³ U.S. Cellular/RCC maintain that the procedure frustrates Section 214(e)(1) because it denies CETCs the ability to meet their obligations to serve throughout entire

¹² *In the Matter of Federal-State Joint Board on Universal Service and In the Matter of Access Charge Reform*, CC Dockets No. 96-45 and 96-262, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45 and Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, (released May 28, 1999), at ¶ 73 (emph. added).

¹³ *In the Matter of Kansas Corporation Commission's Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure*, WC Docket No. 08-55, Comments of Sprint Nextel Corporation (filed June 2, 2008) ("*Sprint Nextel Comments*") at 2-3.

SWB service areas.¹⁴ These arguments confuse and misinterpret Section 214 and the KCC's CETC designation orders.

As NASUCA shows, Sprint and other commenters confuse a CETC's entire service area throughout the state with its designated ETC study area.¹⁵ Pursuant to 47 U.S.C. § 214(e)(1), (2) and (5), the KCC designates CETCs as eligible to receive support for specific study areas of incumbent LECs.¹⁶ For example, the KCC designated Alltel as eligible to receive support in the study areas of twenty-six individual rural ILECs in Kansas.¹⁷ The KCC separately designated Alltel as a CETC in certain specially-created SWB wire center study areas.¹⁸ It discussed Alltel's provision of service in the SWB wire centers separately, and applied a different designation standard.¹⁹ Moreover, Alltel acknowledged in its application that it was applying to be designated as an ETC in multiple study areas. As the KCC reported in the *Alltel CETC*

¹⁴ *U.S. Cellular/RCC Comments* at 10.

¹⁵ *In the Matter of Kansas Corporation Commission's Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure*, WC Docket No. 08-55, Comments of the National Association of State Utility Consumer Advocates (filed June 2, 2008) ("*NASUCA Comments*") at 3-4.

¹⁶ Under 47 U.S.C. § 214(e)(5), a carrier's "service area" is a geographic area that a state commission establishes for the purpose of determining universal service obligations and support mechanisms. For rural telephone companies, their service area is their study area. For other telcos, the state has discretion to establish a different study area. Kansas law also gives the KCC the right to establish different service areas for non rural carriers. See K.S.A. 66-1,187(k); see also *In the Matter of the Application of a Review of the Commission's Federal USF Certification Requirements to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell Telephone, LP., Study Area from the Competitive Eligible Telecommunications Carrier's Justification of Use of High Cost Federal Support*, Docket No. 07-GIMT-498-GIT, Rebuttal Testimony Prepared by Janet Buchanan On Behalf of Kansas Corporation Commission Staff, (filed May 18, 2007) at 13. Attachment 1 ("*Buchanan Rebuttal*").

¹⁷ *In the Matter of the Application of ALLTEL Kansas Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to Section 47 USC 214(e)(2) of the Communications Act of 1934*, Docket No. 04-ALKT-283-ETC, Order Granting ETC Designation and Addressing Additional Issues, Attachment B entitled "Rural LEC Service Areas in which ALLTEL is designated as an ETC" (Sept. 24, 2004). Attachment 2 ("Alltel CETC Order").

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 15-17.

Order, Alltel said it would offer service throughout the “service areas” in which it was designated.²⁰

Bottom line, the KCC designated Alltel as a CETC in each separate ILEC study area.²¹ The KCC concluded that to be designated as an ETC, Alltel had to offer service in the rural telephone companies’ entire study areas and each entire SWB wire center study area.²² It did not combine Alltel’s rural ILEC and SWB study areas into one consolidated service area for universal service purposes.²³

Clearly, neither the Act nor the KCC treats a CETC’s study areas as an undifferentiated whole for universal service purposes. As NASUCA said, the CETCs do not recognize that their ETC designations for SWB’s study areas are separate from their designation in the rural telephone company areas. In addition, the support calculation in rural and non rural carrier areas is separate and the purpose of support is separate.²⁴

The Kansas CETCs also blur the different types of support received in the two types of study areas. A wireless carrier that is designated as a CETC in a SWB wire center receives IAS in that area but not model-based support. The KCC is required to certify CETCs’ receipt of high-cost model support in non rural carrier areas under Section 54.313, but does not certify IAS.

²⁰ *Alltel CETC Order*, at 11, fn. 37, *citing* Alltel’s Amended Application for ETC Designation.

²¹ In its findings, it designated Alltel as an ETC in the SWB wire center study areas subject to conditions, and it designated Alltel as an ETC in each rural ILEC study area, to the extent its footprint “coincide[d] with the service area of a rural ILEC.” *Id.* at 17 and 27-28.

²² *Id.*

²³ Also, while USAC may have assigned one code to all a CETC’s study areas in a state for administrative purposes, USAC does not determine service areas, nor does it have the authority to do so. *Buchanan Rebuttal* at 15.

²⁴ *NASUCA Comments* at 4.

For the KCC's purposes, the SWB study areas are "unsupported" because the KCC does not have jurisdiction or oversight over IAS.

Along these lines, the KCC procedure does not frustrate the intent of Section 214(e)(1) that ETCs be required to offer service throughout their designated study areas. The FCC's determination that it will provide IAS, but not model-based support for SWB high-cost wire centers makes provision of service study-area wide more challenging. The KCC procedure grants CETCs flexibility in counting their investments for certification purposes, but still maintains its basic policy of encouraging CETCs to invest in rural telephone company areas that the FCC has determined need full "high-cost" support.

C. The KCC Procedure is Not Only Consistent with the FCC's Orders Creating State Certification Requirements, But Implements Those Orders Reasonably

Both Alltel and U.S. Cellular/RCC concede that the FCC's orders creating state certification requirements give states authority to direct carriers to spend USF support consistent with Section 254(e).²⁵ However, they argue incorrectly that the KCC procedure violates the orders because the FCC did not allow states to target support to individual wire centers. The CETCs misconstrued the FCC's orders, and also mischaracterize the KCC certification process.

The FCC's orders creating state certification requirements give states broad discretion to determine how support can best be used to advance Congress' goals in Section 254(e). In the *Ninth Report and Order*, the FCC noted that it would not set specific rules for compliance with Section 254(e):

We note, however that we are not attempting to direct the manner in which states incorporate federal high cost support into their ratemaking processes, nor are we setting forth elaborate rules for compliance with Section 254(e). Rather, we

²⁵ U.S. Cellular/RCC Comments at 11-12; Alltel Comments at 7.

anticipate that states will take the appropriate steps to account for the receipt of federal high cost support and ensure that the federal support is being applied in a manner consistent with section 254, and then certify to the Commission that federal high cost support received by non rural carriers in their states is being used appropriately...[W]e find it most appropriate for states to determine how support is used to advance the goals set out in section 254(e).²⁶

To emphasize states' discretion, the FCC said "states can direct carriers to spend the federal support in a manner consistent with section 254(e), though not necessarily in the wire center to which the support was targeted."²⁷ In other words, the FCC refused to restrict states' rights to decide how support would be used and, therefore, would not interfere with that discretion by requiring states to target support to individual wire centers.

The FCC confirmed states' discretion in its later *Order on Remand*.²⁸ AT&T had asked the FCC to clarify that non rural high-cost support must be used in specific wire centers to which it is targeted. Again, the FCC refused to impose such a limitation, stating that "states should decide how support will be used to advance the goals of section 254(e)."²⁹

Moreover, even if the FCC had instructed states not to direct support to individual wire centers, the KCC procedure would still implement the FCC orders properly. The CETCs gloss over the fact that the KCC has not directed that support be spent in any individual or specific wire centers. The KCC procedure allows CETCs to certify costs and investments based on all

²⁶ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 14 FCC Rcd 20432, *Ninth Report and Order and Eighteenth Order on Reconsideration*, (Released Nov. 2, 1999) ("Ninth Report and Order") at ¶ 95.

²⁷ *Id.* at ¶ 83.

²⁸ *See In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 18 FCC Rcd 22559, *Order on Remand*, Further Notice of Proposed Rulemaking and Memorandum, Opinion and Order (released Oct. 27, 2003), ("Order on Remand").

²⁹ *Id.* at ¶ 137.

“supported” study areas, a far larger geographic area than any specific wire center.³⁰ CETCs have the flexibility to count costs in one “supported” study area to justify USF granted for another “supported” study area.

The KCC’s procedure carried out the FCC orders in a reasonable manner. The FCC anticipated that states would take appropriate steps to account for the receipt of federal high-cost support and ensure that support was being applied in a manner consistent with Section 254(e).³¹ Clearly, the KCC certifies support in a manner consistent with Section 254(e), and, in any event, does not direct carriers to use support for any individual wire centers.

IV. THE KCC SEEKS A RULING THAT STATES HAVE DISCRETION TO SET THEIR OWN CERTIFICATION PROCEDURES; THE FACT THAT SOME STATES APPLY DIFFERENT POLICIES DOES NOT INVALIDATE THE KCC PROCEDURE

The KCC has asked the FCC to affirm states’ discretion to set their own certification procedures, consistent with federal law, that reflect individual state policies and characteristics. States are in the best position to determine how support should be used locally to accomplish Congress’ goals in Section 254(e).³² That two states may have adopted different policies does not invalidate the KCC’s procedure. In fact, that states have adopted different procedures confirms the importance of allowing discretion.

In the underlying KCC case, Staff presented information that summarized different state commission approaches to certification of support.³³ While the information provided by states

³⁰ The KCC created special SWB study areas for CETCs composed of individual SWB high-cost wire centers. The KCC did not target any support to these individual wire centers in its certification process.

³¹ See *Ninth Report and Order* at ¶¶ 95-96.

³² *Id.*

³³ *In the Matter of the Application of a Review of the Commission’s Federal USF Certification Requirement to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell* (Footnote Continued)

was not official, it gave insight into state policies. Some states, such as California and Mississippi, applied procedures similar to the KCC approach. Others responded that the issue was not applicable or that they were considering the issue now.

Also, on June 10, 2008, Alaska issued proposed ETC regulations that direct support in a more targeted manner than does the KCC.³⁴ At 3 AAC §53.410(a)(17), the proposed regulations would require ETC applicants to make a commitment to use USF for the provision, maintenance and upgrade of facilities and services that benefit the ETC service area from which support was derived. Thus, Alaska has proposed tying universal service expenditures to the individual study area from which the support was generated.

Missouri and Vermont have made different decisions, based on their own needs. The Vermont Public Service Board (“Vt PSB”) established a single service area for RCC Atlantic that encompassed both rural telephone company study areas and non rural carrier Verizon Vermont’s study area (which receives high-cost model support).³⁵ Among other things, the Vt PSB found that since more support was available in the rural telephone company study areas, separating RCC’s Verizon Vermont area from the rurals’ areas would produce a wireless network that favored the rural telephone company areas.³⁶ The Vt PSB did not address whether RCC could count costs and expenses in an unsupported area to justify support granted for

Telephone, L.P., Study Area from the Competitive Eligible Telecommunications Carrier’s Justification of Use of High Cost Federal Support, Docket No. 07-GIMT-498-GIT, Exhibits JB1 and JB2 of the Direct Testimony Prepared by Janet Buchanan on behalf of the Kansas Corporation Commission Staff (filed May 4, 2007). Attachment 3.

³⁴ *In the Matter of the Consideration of Regulations Governing the Designation of Eligible Telecommunications Carriers*, R-06-03, Order No. 5, Order Issuing Proposed Regulations for Comment (June 10, 2008).

³⁵ *Petition of RCC Atlantic, Inc. for Designation as an Eligible Telecommunications Carrier in areas served by rural telephone companies under the Telecommunications Act of 1996*, Docket No. 6934, Order (entered Sept. 29, 2004) at 53.

³⁶ *Id.*

supported areas, however. Also, the Missouri Public Service Commission (“MPSC”) tentatively found that USCOC of Greater Missouri could use its USF support to make improvements in AT&T Missouri’s wire centers, even though AT&T Missouri did not receive support under the non rural high-cost mechanism.³⁷ MPSC said it did not need to finally resolve this issue until it reviewed the details of U.S. Cellular’s expenditures of USF support.³⁸

An FCC declaration that states can establish reasonable certification procedures based on the characteristics of their states would provide timely guidance, particularly since Alaska is now considering rules raising this issue. The FCC need only find here that the KCC procedure is consistent with the Act. Other state procedures may also reflect reasonable interpretations of Section 254(e) based on state demographics and policies.

V. THE KCC CERTIFICATION PROCEDURE IS COMPETITIVELY NEUTRAL IN ALL RESPECTS

The KCC’s procedure was designed in part to promote competitive neutrality, a critical goal of universal service policy.³⁹ The Kansas CETCs that oppose the KCC certification procedure are in fact trying to create a competitive imbalance that gives them a financial advantage in rural areas served by SWB. The KCC certification procedure directly addresses this imbalance, thereby ensuring competitive neutrality and fostering a competitive marketplace.

³⁷ *In the Matter of the Application of USCOC of Greater Missouri, LLC For Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Case No. TO-2005-0384, Report and Order (dated May 3, 2007) at 30-31.

³⁸ *Id.* p. 31.

³⁹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, Report and Order, FCC 97-157 (rel. May 8, 1997) (“*First Report and Order*”) at ¶ 48.

A. The Kansas CETCs Mischaracterize the Distribution of IAS in Kansas

Alltel and U.S. Cellular/RCC only tell half of the story with regard to IAS. The Kansas CETCs correctly point out that SWB receives IAS for serving rural wire centers in Kansas.⁴⁰ However, they fail to acknowledge that there is no competitive imbalance because CETCs also receive the same amounts of IAS per-line for customers they serve in SWB study areas. U.S. Cellular and RCC acknowledged their receipt of IAS in their joint brief filed with the KCC last year.⁴¹ Don Wood, an economic analyst who appeared before the KCC on May 4, 2007, on behalf of U.S. Cellular and RCC explained:

While AT&T does not receive high-cost model support, it does receive federal universal service support from the High-Cost program in the form of IAS. *CETCs, including RCC and USCOC, also receive the same per-line amount of IAS as AT&T for the customers that they serve in AT&T's service area.*⁴²

This critical omission defeats a major competitive neutrality argument presented by Alltel and U.S. Cellular/RCC. The FCC distributes IAS for all eligible lines to all eligible providers. The IAS distribution method mirrors the principle embodied by the KCC's certification procedure: equal support for all providers in all service areas for which they are certified.

B. The KCC Certification Procedure Treats all ETCs in the Same Manner

In their comments, both Alltel and U.S. Cellular/RCC argued that the KCC certification procedure impermissibly favors SWB because it fails to recognize that SWB's existing wireline

⁴⁰ See Alltel comments at 12, n. 37; U.S. Cellular/RCC comments at 5.

⁴¹ *In the Matter of a Review of the Commission's Federal USF Certification Requirement to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell Telephone, L.P., Study Area from the Competitive Eligible Telecommunications Carrier's Justification of Use of High Cost Federal USF Support*, Docket No. 07-GIMT-498-GIT, Joint Prehearing Brief of RCC Minnesota, Inc. and USCOC of Nebraska/Kansas LLC (filed March 23, 2007) at 6.

⁴² *In the Matter of a Review of the Commission's Federal USF Certification Requirement to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell Telephone, L.P., Study Area from the Competitive Eligible Telecommunications Carrier's Justification of Use of High Cost Federal USF Support*, Docket No. 07-GIMT-498-GIT, Docket No. 07-GIMT-498-GIT, Direct Testimony of Don J. Wood on Behalf of USCOC of Nebraska/Kansas LLC and RCC of Minnesota, Inc. (May 4, 2007) at 18.

network was built over the years with support from both implicit and explicit subsidies.⁴³ This argument attempts to side step the competitive neutrality issue. It tacitly acknowledges that certifying CETC support in SWB study areas violates competitive neutrality in the present, but assumes that this violation is somehow necessary to “level the playing field” and make competitive neutrality possible moving forward. This argument has no merit because it focuses on policy matters beyond the scope of the Petition, is not supported by facts, and fails to acknowledge the realities of the modern telecommunications marketplace.

Neither Alltel nor U.S. Cellular/RCC offered evidence of how SWB actually used USF support to build its network. Both parties make broad statements about SWB’s history of implicit and explicit subsidies.⁴⁴ However, SWB has never qualified for USF support in Kansas under the non rural mechanism.

Also, the CETCs ignore that both states and Congress have enacted legislation to address advantages monopolies enjoyed historically in telecommunications markets. In particular, the Telecommunications Act of 1996 gave competitors new rights to jump start and encourage competition. The FCC developed new universal service rules that harmonized Congress’s dual competition and universal service goals. If the CETCs believe that the federal program does not sufficiently address incumbents’ historical advantages, they should work at the FCC level to make changes. The SWB historical monopoly role is not a unique reality that should somehow be newly factored into the KCC’s certification procedure.

⁴³ *Alltel Comments* at 11-12; *U.S. Cellular/RCC Comments* at 3.

⁴⁴ *U.S. Cellular/RCC Comments* at 14-15; *Alltel Comments* at 11-12.

The competitive neutrality arguments offered against the KCC certification procedure ignore important advantages that wireless CETCs have in the modern marketplace. Arguments that focus on the past fail to acknowledge competitive advantages such as wireless carriers' more cost-efficient technology and CETCs' freedom to enter different markets without carrier of last resort obligations. As NASUCA said, CETCs are free to withdraw at anytime and remove all ETC service obligations.⁴⁵ SWB does not have that option; it must maintain service to all customers. Just looking at historical subsidies oversimplifies today's market realities.

VI. THE KCC PROCEDURE BENEFITS CONSUMERS

The KCC certification procedure directly benefits consumers in Kansas. Consumers in rural areas of Kansas benefit when federal high-cost funds intended for areas designated as high-cost by the FCC are put to work in those areas and not diverted to other locations. The FCC has previously stated its intention that high-cost support "flows to areas with demonstrated levels of costs above various national averages."⁴⁶ The FCC has tasked the states with certifying CETC expenditures of high-cost funds to comply with the Act. The KCC rule discourages Kansas CETCs from spending high-cost support outside of the rural ILEC study areas it was intended to benefit.

At the same time, the KCC allows CETCs considerable flexibility by not requiring that high-cost support be spent in specific supported study areas. A CETC in Kansas may use costs and investments in any "supported" study area to justify its support payments. This flexibility

⁴⁵ *NASUCA Comments* at 4.

⁴⁶ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 05-46, Report and Order (rel. Mar. 17, 2005) at ¶ 55.

was built into the system to allow wireless CETCs to determine the best way to provide quality service for the benefit of rural consumers.

The speculative arguments about harm to consumers presented by Alltel and U.S. Cellular/RCC are baseless.⁴⁷ Alltel suggests that rural wireless consumers would instantly lose and regain coverage when passing between service areas based on whether wireless CETCs in that particular location are certified to receive USF support.⁴⁸ U.S. Cellular/RCC concludes that customers in rural SWB service areas would suffer because wireless CETCs would refuse to provide service in those areas without high-cost support.⁴⁹ These claims are not supported by any “real world” evidence. Neither party can offer proof that the KCC certification procedure has had an adverse impact on rates or on CETC investment in SWB territory. NASUCA’s comments put these allegations in context:

The fact that the wireless carriers do not receive support for their operations in SWB territory has little to do with their entry there. It is safe to assume that the wireless carriers entered into SWB’s territory before they were certified as CETCs – just as many wireless carriers provide service throughout the country without even seeking CETC certification. And it is safe to say that the wireless carriers that filed the federal lawsuit are continuing to provide service in SWB territory, like the other wireless carriers that have not sought CETC designation. And it is also safe to say that if these wireless carriers decide not to continue operating in SWB territory if they can no longer receive federal support for those operations, there will still be wireless service available from wireless carriers that do not need to feed at the federal trough.⁵⁰

⁴⁷ See *Alltel Comments* at 9-11; *U.S. Cellular/RCC Comments* at 19-21.

⁴⁸ *Alltel Comments* at 10.

⁴⁹ *U.S. Cellular/RCC Comments* at 20.

⁵⁰ *NASUCA Comments* at 4-5.

VII. THE KCC PETITION IS TIMELY

Alltel's theory that the Petition is untimely is fatally flawed. First and foremost, the KCC filed the Petition pursuant to a U.S. District Court for the District of Kansas order requiring the KCC to seek a ruling from the FCC on primary jurisdiction grounds.⁵¹ The matter was before the court because U.S. Cellular/RCC appealed the KCC's ruling denying their challenge to the certification procedure.⁵² In their pleadings, U.S. Cellular/RCC specifically asserted that the KCC certification procedure is a live controversy despite the fact that they had not yet been denied support:

Absent intervention by this Court, U.S. Cellular and RCC will be subject to requirements of the KCC which conflict with, and are therefore preempted by, federal law. Accordingly, there is an actual controversy over which this Court has jurisdiction to award declaratory and injunctive relief under 28 U.S.C. §§ 2201(a) and 2201.⁵³

The KCC Petition is timely because of litigation the CETCs initiated.

In a more general sense, the Petition is timely because the basic function of a Petition for a Declaratory Ruling is to "terminate a controversy or remove uncertainty."⁵⁴ The KCC certification procedure has been challenged and defended in multiple pleadings before the KCC, the U.S. District Court for the District of Kansas, the Kansas State Court⁵⁵ and now the FCC.

⁵¹ *USCOC of Nebraska/Kansas, LLC, RCC Atlantic, Inc. v. Kansas Corporation Commission et al.*, Memorandum and Order, Case No. 07-2527 (D.Ks. Jan. 29, 2008).

⁵² *USCOC of Nebraska/Kansas, LLC, RCC Atlantic, Inc. v. Kansas Corporation Commission et al.*, Complaint for Declaratory and Injunctive Relief, Case No. 07-2527 (D.Ks. Oct. 29, 2007).

⁵³ *Id.* at ¶ 14.

⁵⁴ 47 C.F.R. § 1.2 (2006).

⁵⁵ *USCOC of Nebraska/Kansas & RCC Atlantic v. The State Corporation Commission of the State of Kansas*, Shawnee County, KS, District Court Case No. 07C1339, Order Remanding Case to Corporation Commission, (March 30, 2008) p. 1 ("This case is hereby remanded to the Respondent Corporation Commission, which shall take all action consistent with, and necessary and appropriate to, implementation of the order(s) of the [FCC] upon resolution of the Petition which the Commission recently filed with the FCC, designated by the FCC as WC Docket No. 08-55.")

The District Court has specifically requested guidance from the FCC.⁵⁶ There is little question as to whether this is a live controversy that is well-suited for a Declaratory Ruling.

The FCC should not delay action on the Petition until it resolves the pending universal service reform NPRMs.⁵⁷ Alltel's aim appears to be to lull the FCC into inaction by conflating the KCC certification procedure, which simply abides by the FCC's certification rules and the non-rural support mechanism, with far broader universal service reform issues. The Petition has no bearing on the identical support rule or other proposed methods of measuring CETC costs.

Moreover, the Petition is extremely timely in light of the recent *CETC Cap Order*.⁵⁸ That Order plainly stated that controlling the overall size of the Fund is a top priority for the FCC. Thorough state review of CETC costs and investments are an excellent means of controlling Fund growth. Upholding the KCC certification rule will ensure that support is available for the purposes for which it was intended.

VIII. CONCLUSION

For these reasons, the FCC should declare that states are not preempted from adopting reasonable procedures for certifying CETCs' receipt of USF funds and that the KCC's procedure is lawful because it is based on a permissible interpretation of Section 254(e) of the Act.

⁵⁶ *Kansas District Court Order*, *supra* n. 51.

⁵⁷ *Alltel Comments* at 14.

⁵⁸ *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Alltel Communications, Inc. et al. Petitions for Designation as Eligible Telecommunications Carriers and RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, WC Docket No. 05-337 and CC Docket No. 96-45, Order (released May 1, 2008) ("*CETC Cap Order*").

Dated this 17th day of June, 2008

/s/Martha J. Coffman

Martha Coffman
Chief Advisory Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Tel: (785) 271-3105
Fax: (785) 271-3314

/s/Colleen R. Harrell

Colleen Harrell
Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Tel: (785) 271-3105
Fax: (785) 271-3314

/s/ Elisabeth H. Ross

Elisabeth H. Ross
Charles R. Eberle
Birch, Horton, Bittner & Cherot
1155 Connecticut Avenue NW
Suite 1200
Washington, D.C. 20036
Tel: (202) 659-5800
Fax: (202) 659-1027